Supreme Court, U.S.
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No. 98-977

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

THE AMERICAN BIBLE SOCIETY, et. al.

Petitioners,

vs.

BOYD L. RICHIE, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Lonny D. Morrison
Counsel of Record
Of MORRISON & SHELTON
City National Building
807 8th Street, Suite 400
Wichita Falls, Texas 76301-3319
(940) 322-2929

Ronald D. Wells
Of MILNER, LOBEL, GORANSON, SORRELS, UDASHEN & WELLS
2515 McKinney Ave., Suite 1500
Dallas, Texas 75201
(214) 651-1121

Charles W. Cunningham
Robert Elkin
Ruben Brochner, Jr.
Of MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000

Attorneys for Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated

March 11, 1999

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari in this case regarding appellate sanctions when the Petitioner mischaracterizes the appeal by failing to mention the numerous issues appealed by Petitioners to the Fifth Circuit on which Petitioners failed to prevail?

2. Whether the Fifth Circuit clearly abused its discretion under Fed. R. App. P. 38 by imposing sanctions against Petitioners for immediately appealing and seeking mandamus for the District Court's denial their motion to dismiss Respondent's antitrust claims, denial of partial summary judgment on state law claims, and denial of various other interlocutory rulings, when fact issues existed as to the basic applicability of the antitrust exemption claimed and the other rulings unquestionably fell outside of the collateral order doctrine?

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Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated ("Respondent" or "Plaintiff") opposes Defendants' Petition for Writ of Certiorari. Nothing about the award of sanctions against Petitioners merits review by the United States Supreme Court. In fact, Petitioners' glaring omissions from their Petition for Writ of Certiorari counsel against entertaining this appeal any further. Petitioners state that the United States Court of Appeals for the Fifth Circuit sanctioned them for appealing the District Court's refusal to dismiss their antitrust claims. But, in fact, Petitioners frivolously appealed and briefed many different rulings to the Fifth Circuit in this appeal and even invoked the more stringent mandamus jurisdiction in a massive endeavor to reverse those rulings. Defendants' entire conduct, as evidenced in the record, provided ample justification for sanctions. Aside from benefitting from a retroactive change in the law, Defendants utterly failed to obtain any relief on the other issues prosecuted by them in this appeal.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-8) is reported at 143 F.3d 937. The prior opinion of the Court of Appeals (Pet. App. 9-29) is reported at 110 F.3d 1082.The opinion of the District Court (Pet. App. 30-42) is reported at 943 F. Supp. 685. Petitioners also appealed the denial of summary judgment on issues covered in an earlier opinion of the District Court: *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

STATEMENT OF THE CASE

Petitioners begin by misrepresenting the basis for Respondents's claims as resting only on the Sherman Act. In fact, Respondent brought both federal and state law claims. Moreover Petitioners lost their appeals of the state law claims and of certain federal law issues. Yet, they still claim to have prosecuted a meritorious appeal without bothering to mention that but for the intervention of Congress, nothing about their appeals would have succeeded.

1. The Lawsuit

Plaintiff brought this lawsuit in December 1994 to redress numerous wrongs. Specifically, Plaintiff initially alleged that: (1) Defendants had conspired with each other to fix the rates of return on certain fixed-income products marketed by Defendants as investments; (2) certain Defendants had knowingly sold annuities in Texas when the state Insurance Commission had told them that their conduct was illegal; (3) certain Defendants also operated trust businesses and managed money for the general public when the State Banking Commission had told them that such conduct was also illegal; and (4) certain Defendants had committed numerous breaches of fiduciary duty against Plaintiff.

On March 14, 1995, the District Court denied a motion to dismiss brought by three defendants asserting that Defendants' challenged activities did not constitute trade or commerce under the Sherman Act. In fall of that year–six months after District Court's March 14, 1995 ruling on the motion to

dismiss–Defendants sought to have the issue of whether their conduct was trade or commerce under the Sherman Act certified for interlocutory appeal under § 1292, but the District Court denied the request. Defendants' failed attempt to certify the issue recognized the non appealable nature of the District Court's refusal to dismiss on the basis that the Defendants' conduct did not constitute trade or commerce under the Sherman Act. On May 3, 1995, the trial court granted partial summary judgment as to one Defendant's illegal sale of annuities and money management services to Plaintiff under Texas law. *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

2. The Intervening Legislation.

Subsequently, Defendants successfully lobbied for changes in applicable federal and state law. Congress passed the Charitable Gift Annuity Antitrust Relief Act (the "Antitrust Relief Act"), 15 U.S.C. § 37 (Supp. 1995) which made no mention of creating an immunity from suit, but rather provided a substantive defense on the merits to those who could meet its terms. It provided:

> [I]t shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) . . . that are exempt from taxation under section 501(a) . . . to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

Defendants also pushed through Texas legislation purportedly authorizing nonprofit organizations to sell annuities without being licensed to sell insurance and to operate trust businesses for the general public without being organized as trust companies. *See* TEX. BANKING CODE ANN. art. 342-1113(3); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Texas Non-Profit Corporations Act); TEX. INS. CODE ANN. art. 1.14-1A § 2(a) and (b). Like the federal statute, the state statutes contained no mention of immunity from suit. Instead, they granted authority to engage in certain otherwise prohibited transactions and activities.

As a result of the new federal and state legislation, Defendants filed various motions to dismiss or for summary judgment based on the Antitrust Relief Act and the amended Texas statutes. Plaintiff opposed these motions and sought leave to amend his complaint to assert that Defendants were outside the scope of the laws or engaging in illegal activities that were outside the scope of the laws.

3. **Defendants' Frivolous Appeals to the Fifth Circuit.**

This activity culminated when the District Court ruled on the motions to dismiss and for summary judgment or partial summary judgment. *Richie v. American Council on Gift Annuities*, 943 F. Supp. 685 (N.D. Tex. 1996), *rev'd in part*, *Ozee v. American Council on Gift Annuities*, 143 F.3d 937 (5th Cir. June 12, 1998). The court:

1. denied Defendant Lutheran Foundation of Texas's October 26, 1995, Motion to Reconsider

the May 3, 1995, Order Granting Partial Summary Judgment;

2. denied Defendant American Council on Gift Annuities' and Defendant Lutheran Church Missouri Synod's November 22, 1995, Motion for Partial Summary Judgment on Texas Statutory Claims;

3. denied Defendants' December 14, 1995, Motion to Dismiss based on the Antitrust Relief Act;

4. denied Defendant Northwestern University's Motion for Summary Judgment on the Antitrust Relief Act filed January 26, 1996;

5. granted Plaintiff's February 13, 1996, Motion for Leave to File Fourth Amended Class Action Complaint;

6. denied Defendants' August 27, 1996, Renewed Motion for Relief based on the above motions; and

7. abated all discovery except that pertinent to whether the Council was entitled to the new antitrust exemption.

In different permutations, Defendants filed three notices of appeal regarding ruling numbers 2 through 6 of the District Court's rulings.

In the Fifth Circuit, all Defendants, including Petitioners, jointly filed an opening brief seeking review of both the federal and state issues raised by their appeals. They all joined in the same Statement of Jurisdiction invoking the rare "collateral order doctrine," claiming that jurisdiction existed because the order

denying their motion to dismiss under the Antitrust Relief Act (no. 3) and permitting the pleading amendment (no. 5) satisfied the three elements of the collateral order doctrine as an immunity from suit. This claim was particularly surprising because *nowhere* in their briefing on these issues before the District Court had Defendants asserted that the Antitrust Relief Act was an immunity from suit as opposed to an ordinary defense on the merits. Additionally, Defendants' Statement of Jurisdiction offered no basis for jurisdiction over the denial of the so-called Renewed Motion for Relief (no. 6), the motions for partial summary judgment on state law claims (no. 2), or Northwestern's partial summary judgment motion (no. 4). Thus, although Defendants purported to appeal rulings numbers 2, 3, 4, 5, and 6, the Statement of Jurisdiction alleged jurisdiction only as to rulings numbers 3 and 5.

Plaintiff moved to dismiss Defendants' appeals and sought sanctions because none of the rulings from which Defendants appealed constituted final judgments or collateral orders under 28 U.S.C. § 1291. All of the Defendants, including Petitioners, joined in opposing the Motion to Dismiss Defendants' Appeals and seeking to support this Court's jurisdiction over *all* of the issues raised in the various notices of appeal.

In addition to attempting to invoke appellate jurisdiction, Defendants, including Petitioners, sought mandamus in the Fifth Circuit attacking the same rulings, both state and federal, that were at issue in the direct appeal. Yet, as the Fifth Circuit

correctly held, none of the rulings approached the type of trial court abuse justifying such an extreme measure.

Accordingly, a panel consisting of Judges Reavley, Smith, and Emelio Garza (the "Fifth Circuit") dismissed Defendants' appeals and sanctioned Defendants in the amount of $15,000–less than fifteen percent of Plaintiff's costs and fees involved in responding to the appeals.[1] *See Ozee v. American Council on Gift Annuities, Inc.*, 110 F.3d 1082, 1097 (5th Cir.), *cert. granted*, 139 L. Ed. 2d 486, 118 S. Ct. 596, ___ U.S. ___ (1997) (*Ozee I*).

Defendants sought rehearing *en banc* of that ruling, which was denied. They sought a stay of the Fifth Circuit's mandate, which was also denied by both the Fifth Circuit and Justice Scalia. Shortly after these events, Congress passed the Charitable Donation Antitrust Immunity Act that, for the first time, actually gave Defendants an immunity from suit under the antitrust laws as opposed to the mere defense to liability provided by the prior law. The Supreme Court granted certiorari, vacated *Ozee I*, and remanded the case to the Fifth Circuit for reconsideration in light of the new law. *American Bible Soc'y v. Richie*, 139 L. Ed. 2d 486, 118 S. Ct. 596, ___ U.S. ___ (1997).

The Fifth Circuit then ordered additional briefing on the new law. Plaintiff conceded that the new law applied to this case

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[1]At oral argument, the Fifth Circuit requested that Plaintiff submit a summary of its attorney time and expenses for use by the court in assessing possible sanctions. At that time, Plaintiff's attorneys had incurred approximately $125,000.00 in attorney's fees and expenses responding to Defendants' ill-fated appeal.

but sought reimposition of sanctions for Defendants' conduct prior to the change in the law and other conduct not affected by the new law. On June 7, 1998, the Fifth Circuit issued its opinion on remand. *Ozee v. American Council on Gift Annuities, Inc.*, 143 F.3d 937 (5th Cir. June 12, 1998) (*Ozee II*). In that opinion, the Fifth Circuit dismissed Plaintiffs' antitrust claims, but it refused to consider the state law claims and reimposed the $15,000 sanctions on all thirty-two Defendants.

The Fifth Circuit noted that frivolity should be measured by the law in effect at the time of the sanctionable conduct. Under that law, "their appeal was frivolous under the plain statutory language that existed at the time." Moreover, even if the Fifth Circuit had applied the new law, Defendants' invocation of pendent jurisdiction over the state law issues appealed by them was frivolous as was their attempt to seek mandamus. Accordingly, the Fifth Circuit properly sanctioned Petitioners and review by certiorari would not be proper.

REASONS FOR DENYING THE PETITION

The present case does not merit granting review by writ of certiorari of the sanctions awarded against Defendants because decisions of the United States Supreme Court and the Fifth Circuit permitted sanctions in this case. Additionally, the sanctions in issue did not rest solely on issues of "first impression," but rather involved well-established principles regarding the collateral order doctrine. And regardless of whether an issue of first impression appeared somewhere in these appeals, numerous alternate reasons existed for sanctioning Defendants, not just those allegedly involving questions of first impression.

1. The Fifth Circuit's Sanctions of Petitioner Complied with Supreme Court Precedent.

Petitioners misconstrue *McKnight v. General Motors, 511 U.S. 659 (1994)* and ignore *Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987)* in their futile effort to create a conflict between their sanctions and Supreme Court precedent. Moreover, Petitioners trumpet a nonexistent rule against sanctioning parties in "cases of first impression" in another effort to create conflict.

Defendants make a futile effort to extrapolate *McKnight v. General Motors* into a broad general rule prohibiting sanctions in cases of first impression. But that case does not so hold. According to this Court, "Federal Rule 38 adopts a case-by-case approach to identifying and deterring frivolous appeals ... ." *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 8 (1987). An

"appellant does not have to conduct an appeal in a manner sanctioned in other cases in order for us to view the appeal as necessarily lacking plausible argument following a clean disposition of the issues by the district court." *Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988).

Defendants do not address this point, but instead advocate a rule prohibiting sanctions in all cases of "first impression." But neither the Supreme Court nor the Fifth Circuit require that approach. Petitioners incorrectly rely on several Fifth Circuit cases and a *McKnight* for the proposition that *all* cases involving issues of first impression preclude sanctions under Federal Rule of Appellate Procedure 38. No rule of "first impression immunity" exists under Rule 38, and this Court should not create one.

Defendants' citation to *McKnight v. General Motors Corp.*, 511 U.S. 659 (1994) is inapposite. Nowhere in *McKnight* can one find the broad pronouncement advocated by Defendants that a meritless appeal under circuit precedent is not sanctionable in the absence of controlling Supreme Court precedent. Under this erroneous view of sanctions, Petitioners reject the Fifth Circuit's view that their appeal "was frivolous under the plain statutory language that existed at the time." *OzeeII* (Pet. App. at 7). Ironically, in light of Defendants' reliance on Congress to rid them of this antitrust suit, Defendants' view of *McKnight* would preclude a court from imposing sanctions in a circumstance in which Congress had written a law about which a party advocated a frivolous interpretation unless the Supreme Court had specifically rejected

that frivolous interpretation. Were this the law, Plaintiff could have advocated that the Charitable Donation Antitrust Immunity Act of 1997 provided no immunity from suit and could not have been sanctioned until the Supreme Court rejected that interpretation.

In reality, *McKnight* narrowly held that an issue over which other courts are divided and on which the Supreme Court has not ruled may not be the "only basis" for an order imposing Rule 38 sanctions. It plainly did not address cases of alleged "first impression," but rather dealt with cases of "unsettled" law. And it certainly did not create any sort of general rule that, in all cases involving issues of first impression, a court may not impose sanctions under Rule 38.

With respect to Fifth Circuit precedent, Defendants assert that *Estiverne v. Salk's Fifth Avenue*, 9 F.3d 1171 (5th Cir. 1993); *Ehm v. Amtrak Bd. of Directors*, 780 F.2d 516 (5th Cir. 1986); and *Adult Film Ass'n v. Thetford*, 776 F.2d 113 (5th Cir. 1985), hold that imposing Rule 38 sanctions in cases of first impression is improper. While these cases did cite to either the novelty of a legal question or its "first impression" status, they do not adequately support that general rule. At least one Fifth Circuit case imposed sanctions in a case in which the appellant made at least one novel argument. *See Shinn v. College Station I.S.D.*, 96 F.3d 783 (5th Cir. 1996).

In the end, the first impression immunity from sanctions advocated by Petitioners cannot be squared with this Court's Rule 38 jurisprudence. It requires that Rule 38 sanctions be determined on a case-by-case basis. *Burlington Northern R.R. v.*

Woods, 480 U.S. 1, 8 (1987). Under this approach, the question is not whether one of the issues on appeal involved a question of first impression, but whether the appellant's conduct was sanctionable. *Anderson v. Steers, Sullivan, McNamar & Rogers*, 998 F.2d 495 (7th Cir. 1993) (imposing sanctions even though the question was "a novel one in this circuit"); *see Reliance Ins. v. Sweeny Corp.*, 792 f.2d 1137 (D.C. Cir. 1986) (sanctioning appellant for asserting a "novel position").

Appellate sanctions serve the important roles of compensating parties for the harm resulting from frivolous appeals and of preventing the waste of judicial resources by deterring frivolous appeals. *See Coghlan v. Starkey*, 852 F.2d 806, 815 (5th Cir. 1988); *Stelly v. Commissioner*, 761 F.2d 1113, 1115-1116 (5th Cir.), cert. denied, 474 U.S. 851 (1985). A rule of "first impression immunity" advocated by Defendants would contravene both of these polices. "A claim that is utterly insupportable may be sanctionable even if the circuit has not addressed the issue." *United States v. Alexander*, 981 F.2d 250, 253 (5th Cir. 1993). In the absence of such a rule, an obviously frivolous but untried legal argument of "first impression" would not be sanctionable. And that result would impair the integrity of the legal profession and the administration of justice.

2. The Fifth Circuit Properly Looked at the Law as it Existed at the Time of Petitioners' Frivolous Appeals to Judge Sanctions.

Petitioners next contend that the Fifth Circuit's use of the law as it existed at the time of the original appeal rather than as subsequently amended conflicts with this Court's precedent in *United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed 49 (1801) and earlier remand in this case. This argument by Petitioners mistakes the requirement that retroactive laws be applied retroactively for one that would require a court assessing sanctions to change the *underlying facts* of the sanctionable conduct once the law on which a sanctionable appeal was ostensibly based was amended. In this situation, the law in effect when the sanctionable act occurred becomes a fact that cannot be changed. Petitioners can site to no precedent that permits Congress to change the facts of a case. Moreover, any amendment to the Sherman Act subsequent to the Petitioners' sanctionable appeal did not amend the law to be applied when determining appellate sanctions - Federal Rule of Appellate Procedure 38.

3. The Sanctions did not Rest on "Issues of First Impression," but Rather Defendants Advanced Arguments in the Face of Well-established Precedent Resulting in Sanctions.

Certiorari should also be denied because a fundamental aspect of Petitioners' request rests on the vague and unspecified assertion that the award of sanctions in *Ozee I* and *Ozee II* rested on "issues of first impression." It appears that Defendants'

assertion that sanctions were based upon "issues of first impression" refers to the fact that at some level, the case involved the construction of the Antitrust Relief Act. Prominently missing from Petitioners' Petition for Writ of Certiorari is an identification of exactly what "issues of first impression" precluded sanctions.

While the Fifth Circuit's initial ruling did address the collateral order issues in the context of a new statute, Defendants' claims "were advanced in the teeth of firmly established rules of law for which there is no arguably reasonable expectation of reversal or favorable modification." *Simon & Flynn, Inc. v. Time, Inc.*, 513 F.2d 832, 835 (2d Cir. 1975). And the sanctions rested on these principles and not just the meaning of the new statute.

For example, an appealable collateral order does not exist unless the ruling conclusively determines the matter. *Swint*, 115 S. Ct. 1203; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As the Fifth Circuit recognized, the District Court's rulings were expressly without prejudice to further consideration of the matters. The Fifth Circuit also found that Defendants "failed to come to grips" with the well-established rule that fact issues pertaining to an alleged immunity may not be appealed under the collateral order doctrine. Similarly, although not directly mentioned by the Fifth Circuit, Defendants' ignored the recent, but well established rule set forth in *Swint*, that appellate jurisdiction pendent to a collateral order would only be permitted in extremely limited circumstances. As a result, the Fifth Circuit properly sanctioned Defendants for

advocating untenable positions in the face of well-established precedent.

4. Numerous Aspects of these Appeals, Other than the So-called "Issues of First Impression," Justified Rule 38 Sanctions.

Defendants misdirect the Court and ignore the procedural history of this case by asserting that the Fifth Circuit improperly based its sanctions only on alleged "issues of first impression." In *Ozee I*, the Fifth Circuit properly found, based on applicable Fifth Circuit case law, that Defendants' were pursuing "legal points not arguable on the merits" or points "in which the result [was] obvious." *Ozee I*, 110 F.3d at 1097. Among other things, the Fifth Circuit expressly based these findings on the fact that Defendants failed to make a "thorough examination of ... the decision being appealed" and failed to make a "thorough examination of the rules governing ... appellate jurisdiction." *Ozee I*, 110 F.3d at 1097; *see id.* (stating, "It defies reality for the defendants to continue to argue that they can collaterally appeal the District Court's ruling in the face of its true basis."). Even in *Ozee II*, the Fifth Circuit stated, "We sanctioned the defendants under FED. R. APP. P. 38 for filing a frivolous appeal, noting that in pursuing their collateral appeal, the defendants had blithely ignored the nature of the claim and the basis of the District Court's ruling." *Ozee v. American Council on Gift Annuities, Inc.*, 143 F.3d 937 (5th Cir. 1998). Thus, in both opinions, the sanctions are not necessarily tied to the meaning of the new law.

Indeed, many different aspects of Defendants conduct justified imposing sanctions. For example, Defendants appealed from the March 14, 1995 District Court ruling that gift annuities were not trade or commerce under the Sherman Act which preceded the appeals by more than eighteen months. In fact, the District Court had already refused to certify an interlocutory appeal on that very issue. By attempting that interlocutory appeal, Defendants had already acknowledged the non final nature of the District Court ruling, but they sought to use the avenue of a "Renewed Motion for Relief" to get another bite at the appellate apple. Such tactics are precisely the sort of conduct at which courts direct Rule 38 sanctions.

Defendants also appealed the District Court's denial of partial summary judgment on Plaintiff's state law claims for illegally selling annuities or operating trust businesses. No plausible interpretation of the revised Texas statutes existed to create an immediately appealable immunity from suit, and the doctrine of pendent appellate jurisdiction clearly did not support jurisdiction over these issues in this appeal. *Swint v. Chambers County Comm'n.*, 115 S. Ct. 1203, 1208 (1995). Defendants, including Petitioners, weakly invoked pendent appellate as "arguably" supporting jurisdiction for review of the state law issues by citing *Swint*, 115 S.Ct. at 1212. *Swint*, however, clearly rejected the notion that appellate courts have pendent jurisdiction over independently non appealable issues or parties, except possibly in extremely narrow circumstances: if the non appealable order is "inextricably intertwined" with the appealable one, or if review of the former is "necessary to ensure

meaningful review of the latter." *Id.* In *Swint*, the Court denied pendent appellate jurisdiction when the immunity issue turned on federal law and the non appealable ruling turned on state law–even though the issues arose from the same conduct. *Id.* at 1212. In the present case, Defendants asserted, but did not cite to any authority, that by alleging Defendants' conduct violated both state and federal law, the claims were "inextricably intertwined"–the very argument rejected in *Swint*. Moreover, they made *no attempt* to establish that review of the state law issues was "necessary to ensure meaningful review" of the antitrust exemption issues. *Swint*, 115 S. Ct. at 1212.

Moreover, a cursory reading of the Fifth Circuit's opinion in *Ozee I* reveals its frustration with Defendants' meritless appeals. For example, with respect to Defendants' ill-conceived mandamus request, the Fifth Circuit stated, "Most of the petition simply recycles the arguments of defendants' appeal in the substantially stricter mandamus context." *Ozee I*, at 1093. With respect to the state law issues raised by Petitioners, the Fifth Circuit opined, "The summary judgment they complain of is addressable both through certified appeal under 28 U.S.C. § 1292(b) and through direct appeal after final judgment. The grant of summary judgment was neither an abuse of discretion nor a `usurpation of power,' and whatever right petitioners might have to relief on the merits is far from being `clear and indisputable.'" *Id.*

Petitioners arrogantly assert that they advanced a successful appeal as some sort of shield against the sanctions. In reality, Petitioners advocated frivolous positions and lost their

appeal with respect to the state law claims. With respect to the federal claims, they failed with regard to their appeal of whether charitable gift annuities are trade or commerce under the Sherman Act, and it was only the intervention of Congress that obtained the result sought by Defendants. Any "success" certainly did not rest on the sanctionable arguments initially advanced by them.

Finally, even a party that is successful in one part of an appeal may be properly sanctioned under Rule 38. "The rule authorizes the imposition of sanctions for the part of an appeal that is frivolous even if the presence of a colorable ground prevents the entire appeal from being adjudged frivolous." *Hill v. Norfolk & W. Ry. Co.*, 814 F.2d 1192, 1200 (7th Cir. 1987); *see McEnery v. Merit Systems Protection Bd.*, 963 F.2d 1512, 1516-17 (Fed. Cir. 1992); *In re Perry*, 918 F.2d 931, 935 (Fed. Cir. 1990).

In sum, the other frivolous aspects of Defendants' appeals provided ample basis in the record for the Fifth Circuit to have awarded sanctions on any number of grounds in the first instance and to subsequently reimpose them. Since Petitioners have not explained why the United States Supreme Court should grant review in light of the entire record of sanctionable conduct, the Court should deny Petitioners' Petition for Writ of Certiorari.

CONCLUSION

For these reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

Lonny D. Morrison
Counsel of Record
Of MORRISON & SHELTON
City National Building
807 8th Street, Suite 400
Wichita Falls, Texas 76301-3319
(940) 322-2929

Charles W. Cunningham
Robert Elkin
Ruben Brochner, Jr.
Of MCKOOL SMITH, P.C.
300 Crescent Court, Suite 1500
Dallas, Texas 75201
(214) 978-4000

Ronald D. Wells
Of MILNER, LOBEL, GORANSON,
SORRELS, UDASHEN & WELLS
2515 McKinney Avenue, Suite 1500
Dallas, Texas 75201
(214) 651-1121

Attorneys for Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated